Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	**WT Docket No. 95-157**
Regarding a Plan for Sharing	)	**RM-8643**
the Costs of Microwave Relocation	)	

To: The Commission

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION/CLARIFICATION

Pursuant to Section 1.429 of the Federal Communications Commission's (Commission) Rules, UTC hereby urges the Commission to reject the Personal Communications Service (PCS) and Mobile Satellite Service (MSS) industries' attempts to disrupt the relocation and cost-sharing rules adopted by the Commission in its *First Report and Order (FR&O)* in the above-referenced docket. In particular, UTC opposes the *Petitions for Reconsideration and Clarification* filed by Omnipoint Communications Inc. (Omnipoint), the MSS Coalition[1] and jointly by various PCS organizations.[2]

As the representative on communications matters for the nation's electric, gas and water utilities and pipelines -- many of which operate 2 GHz microwave systems -- UTC has been actively involved in all stages of this proceeding and has itself requested clarification of the relocation rules. UTC's *Petition for Reconsideration/Clarification*, filed July 12, 1996,

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[1] This coalition is comprised of ICO Global Communications, Comsat Corporation, Cellsat America, Personal Communications Satellite Corporation and Hughes Space and Communications International.

[2] A joint petition was filed by AT&T Wireless Services, Inc., GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation and the Cellular Telecommunications Industry Association (the PCS Joint Petitioners).

recommends that the Commission better protect the vital public safety-related operations of utilities and pipelines in the 2 GHz band by: (1) clarifying that, in evaluating "communications throughput" to determine "comparability" of replacement facilities, incumbents may request capacity equal to demonstrated actual and anticipated needs; and (2) eliminating the ten year sunset provision on relocation obligations or, alternatively, clarifying that the ten year period begins on the initiation date of the last voluntary negotiation period for a particular emerging technology service.

UTC urges the Commission to retain and strengthen its protection of incumbent operations by adopting the proposals set forth by UTC in its petition and by rejecting the PCS and MSS industries' attempts to abrogate their responsibilities under the already-established relocation rules. The Commission must, once and for all, re-confirm the basic transition framework and terminate the seemingly ceaseless bitching by the emerging technology industries.

I. The Commission Must Retain the Flexibility of the Current Relocation Rules

A. Prohibitions on Cash Payments During the Mandatory Negotiation Period Are Unnecessary

In the *First Report and Order*, the Commission clarified its "good faith" requirement for negotiations during the mandatory negotiation period by delineating four (4) characteristics that it will examine to determine whether a party is acting in good faith. Among these characteristics is the type of premium requested and the proportionality of the premium to the replacement facility costs. The Commission refused to adopt a hard-and-fast rule regarding good faith

negotiations, noting that "[a]s the commenters on this issue demonstrate, the question of whether parties are negotiating in good faith typically requires consideration of all the facts and circumstances underlying the negotiations, and thus is likely to depend on the specific facts in each case."[3]

In its petition, Omnipoint requests that the Commission reconsider this rule and determine that any request for cash payments over and above the direct relocation costs be considered a violation of the good faith negotiation requirement.[4] According to Omnipoint, reconsideration of this rule will "reduce some of the problems in the future."[5]

UTC urges the Commission to reject Omnipoint's rigid proposal. Unlike the existing rule, which gives the parties the ability to "negotiate" during the negotiation periods, Omnipoint's proposed rule would essentially transform the mandatory negotiation period into an extension of the involuntary relocation process. Many incumbents would lose their incentives to relocate quickly or to accommodate any PCS licensees' demands beyond those mandated by the rules. Moreover, adopting an inflexible prohibition on cash payments would undoubtedly cause more problems than it would solve For instance, incumbents may hesitate to negotiate cash settlements in which they construct their own replacement facilities for fear of being accused of bad faith negotiations; in turn, negotiations may become bogged down by the additional terms necessary for incumbents to ensure that PCS-provided relocation facilities are comparable. This inflexible rule would also lead to numerous disputes over when requests for cash payments for

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[3] *FR&O*, ¶20 (footnote omitted).
[4] Omnipoint's *Petition for Reconsideration and Clarification*, pp. 4-6.
[5] Omnipoint's *Petition for Reconsideration and Clarification*, p. 5.

certain relocation costs, such as operating costs for transition facilities, will be considered requests for premiums and hence not part of good faith negotiations. The rules for mandatory negotiations must be flexible enough for true negotiations to occur; the current rules permit such flexibility and should not be changed.

Omnipoint's proposed rules are also unnecessary to protect against cash "windfalls." The current rules already include an analysis of the proportionality of the "premium" to the hard relocation costs as part of the determination of good faith. Therefore, incumbents requesting cash payments that are disproportionate to the relocation costs may be considered to be acting in bad faith under the current rules.

B. The Relocation of Non-PCS Paths May be Necessary To Preserve System Integrity

Omnipoint also recommends that the Commission specifically categorize all requests for the replacement of upper 2 GHz (2110-2200 MHz) equipment as "premiums." While UTC agrees that in most cases such requests will in fact be premiums, UTC recommends that the Commission avoid adopting inflexible rules on this issue. The reliability of the incumbent system must remain the paramount consideration in determining the PCS licensees' obligations. As the Commission noted in the *FR&O*, "if providing a seamless transition requires it, PCS licensees must relocate additional links or pay for additional costs associated with integrating the new links into the old system .." Therefore, if the relocation of upper 2 GHz microwave links are necessary to provide a seamless transition, the PCS licensee must relocate these links; in all other cases, the request for the relocation of these links would be considered a "premium". The

Commission must not intrude on the negotiation process by adopting the unnecessarily inflexible rule proposed by Omnipoint.

II. The Basic Transition Framework Must Not Be Modified

In their *Petition for Reconsideration Or, In the Alternative, For Rulemaking*, the PCS Joint Petitioners urge the Commission to modify the basic relocation rules to require incumbents to complete the relocation process and vacate the 2 GHz frequencies by the end of the mandatory period.[6] The Commission must reject the Joint Petitioners' proposal on both procedural and substantive grounds.

The Joint Petitioner's proposed rule modifications do not fall within the scope of the *Notice of Proposed Rulemaking (NPRM)*. The Commission noted this procedural defect in the *FR&O*[7] and rejected the proposal, which was initially raised by the PCS industry in an April 15, 1996, *ex parte* filing.[8] However, despite the Commission's determination, the Joint Petitioners claim that the parties were somehow given appropriate notice of the Joint Commenters' proposal from the "general nature" of the *NPRM*. The "nature" of the *NPRM*, whatever that may be, does not provide the Commission with the authority to circumvent the provisions of the Administrative Procedures Act. The Commission correctly acknowledged this by refusing to address this issue in the *NPRM*.

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[6] Joint Petitioners' *Petition for Reconsideration Or, In the Alternative, For Rulemaking*, p. 5.

[7] *FR&O*, ¶52.

[8] Letter to Michele Farquhar, Chief of the Wireless Telecommunications Bureau, filed by AT&T Wireless PCS, inc., Bell South Personal Communications, DCR Communications, GTE Mobilnet, Pacific Bell Mobile Services, PCS PrimeCo, L.P. and Western PCS Corporation.

The Commission must also reject the PCS Joint Petitioners' request for an expedited rulemaking proceeding on this issue. As UTC and other have noted numerous times in this proceeding, and as the Commission itself noted in the *NPRM*, the basic transition framework is sound and equitable.[9] The current rules are working, and relocation agreements are being reached. Even those incumbents who were once unfairly accused of being "extortionists" by the PCS industry have entered mutually-beneficial relocation agreements, resulting in the written retraction of these allegations by the PCS licensees.[10]

The issues raised by the PCS industry in the April 15, 1996, *ex parte* filing and referenced in the PCS Joint Petitioners filing do not require Commission action. According to the PCS industry *ex parte* filing, the "problems" with the relocation framework surround: (1) whether the parties must agree on what constitutes an adequate replacement system; (2) whether the parties must agree on the costs of the relocation or on a determination of comparability of new facilities; (3) in what time frame these agreements must be completed; and (4) the delays in PCS deployment that may be caused by the current rules. The first three of these issues are subject to negotiations between the parties. The Commission should not intrude on these negotiations by limiting either sides' ability to negotiate such terms as pricing, comparability and timing. Additionally, the recently-adopted changes will provide some guidance on these issues during the mandatory period by delineating the factors to be examined to determine

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[9] *NPRM*, ¶3.

[10] For example, Sprint Spectrum recently filed a letter with the Commission to refute the unfounded allegations against Williams Wireless made by the Cellular Telecommunications Industry Association. The July 26, 1996, letter notes that Williams has been in full compliance with the rules and has entered into a "reasonable agreement" with "a very aggressive completion date." This is at least the third such letter filed by Sprint Spectrum refuting earlier allegations of "extortion" made by CTIA.

"comparability." Therefore, no Commission action is warranted. The fourth issue is based on an inaccurate picture of the status of negotiations. As numerous parties have noted, and as UTC's survey of microwave incumbents has proven, the rules are working and are not delaying the advent of PCS. UTC's March 1996 survey demonstrated that almost one-third of respondent microwave licensees had already entered into agreements for the relocation of one or more of their links. Almost two-thirds were in active negotiations with PCS licensees.

The changes to the basic structure proposed by the Joint Petitioners are unworkable and grossly unfair to incumbents. Requiring all incumbents to relocate by the end of the mandatory relocation period is not feasible because incumbent microwave systems are complex systems which serve vital needs. They cannot be moved quickly -- the incumbent must make a technical evaluation of the most appropriate replacement facilities, plan a replacement schedule which maintains the reliability of the current system while the replacement facility is being constructed, evaluate the current infrastructure (including towers) to determine their suitability for the new equipment during and after the transition, purchase the equipment, await equipment availability and shipping, install equipment while maintaining the current system, test and adjust the new system in a variety of weather conditions and turn off dismantle the old equipment.

The Joint Petitioner's proposal is also grossly unfair to incumbents. Incumbents would be forced to accept offers without sufficient time to evaluate the proposals; getting started on the relocation process would take precedence over ensuring comparability. For many incumbents, the one-year mandatory period will be the only time they will have to negotiate. Given the time

needed to construct their new system, they should not be pressured to accept initial offers with little or no time for consideration. PCS licensees on the other hand will an incentive to delay the process because each day of the mandatory period that goes by puts additional pressure on the incumbents.

III. The Basic Transition Framework Must Apply to the Upper 2 GHz Bands

In the *FR&O*, the Commission correctly acknowledged that "the microwave relocation rules already apply to all emerging technology services," and noted that it may tailor its MSS relocation rules to the specific needs and requirements of the MSS licensees and incumbents operating in this band. [11] This acknowledgment was no more than a reiteration of the Commission's rules in ET Docket No. 92-9 regarding the establishment of the transition framework for the entire emerging technology band.[12]

In its petition, the MSS Coalition requests that the Commission not apply the relocation rules to the upper 2 GHz band. Instead, it proposes that transition framework proposed by Comsat in ET Docket No. 95-18 be adopted for this band.[13] This proposed framework would eliminate virtually all protection for incumbents and is based on unfounded claims that sharing between MSS and incumbent operations is feasible.

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[11] *FR&O*, ¶92.

[12] As the Commission made abundantly clear throughout that proceeding, the basic transition framework was to be applied to the entire 2 GHz band, not just to the PCS bands. "By this action the Commission is providing for the redevelopment of the 220 MHz of spectrum in the 1.85 to 2.20 GHz band for future communications services that employ emerging technologies." *First Report and Order and Third Notice of Proposed Rulemaking*, ET Docket No. 92-9, ¶1.

[13] Comsat Corporation's *Supplemental Comment*, filed March 14, 1996, in ET Docket No. 95-18.

The Commission must reject the attempt by the MSS Coalition to narrow the application of the relocation rules. The correct scope of these rules has been established since the Commission's *First Report and Order* in ET Docket No. 92-9. Moreover, it has been reconfirmed in subsequent orders in that proceeding and in *the Notice of Proposed Rulemaking* in ET Docket No. 95-18.[14] There is no room for clarification of this matter -- it is already crystal clear that the upper 2 GHz band is subject to the basic transition rules.

The MSS Coalition's request for reconsideration of this matter must also be rejected on procedural grounds. The Commission was quite clear in the *NPRM* that the basic transition rules did apply to the upper 2 GHz band; the only issue raised in the *NPRM* was whether the changes adopted in this proceeding should also apply to that band.

> The microwave rules that we adopted in the *Emerging Technologies* proceeding apply to all emerging technologies services. In the *Cost-Sharing Notice*, we requested comment on whether the change and clarifications we proposed should also apply to all emerging technology services, including non-PCS services (*e.g.* 2110-2150 and 2160-2200 GHz [*sic*]) that have already been licensed.[15]

As this issue was not raised in the *NPRM* or in the *FR&O*, it is not an appropriate issue for a *Petition for Reconsideration* of the *FR&O* pursuant to 47 C.F.R. §1.429(a). The appropriate proceeding for the disposition of the MSS Coalition's proposal for the sharing of upper 2 GHz band between MSS and incumbent operations is the rulemaking proceeding currently investigating the possibility of allocating the upper 2 GHz band to MSS, ET Docket No. 95-18.

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[14] *Notice of Proposed Rulemaking*, ET Docket 95-18, ¶11.

[15] *FR&O*, ¶90 (footnote omitted).

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in this opposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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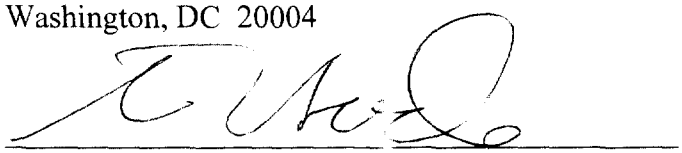

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